

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Arroyo Energy LP  
Calpine Energy Services, L.P.  
Calpine Merchant Services Company, Inc.

Docket No. EC05-138-000

ORDER AUTHORIZING DISPOSITION  
OF JURISDICTIONAL FACILITIES

(Issued October 31, 2005)

**I. Introduction**

1. On September 13, 2005, Arroyo Energy LP (Arroyo Energy), Calpine Energy Services, L.P. (Calpine Energy), and Calpine Merchant Services Company, Inc. (Calpine Merchant) (collectively, Applicants) filed an application under section 203 of the Federal Power Act (FPA)<sup>1</sup> requesting authorization to dispose of jurisdictional facilities in connection with (1) an internal corporate restructuring upstream of Arroyo Energy and (2) contractual arrangements under which Calpine Merchant would perform certain energy trading and related functions on behalf of Calpine Energy and CalBear Energy LP (CalBear Energy), the successor of Arroyo Energy. The jurisdictional facilities involved with the proposed transaction include Applicants' tariffs, associated contracts, books and records.

2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.<sup>2</sup> We will authorize the proposed transaction, as we find that it will not have an adverse effect on competition, rates or regulation and is thus consistent with the public interest.

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<sup>1</sup> 16 U.S.C. § 824b (2000).

<sup>2</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 19, 1996), FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

## **II. Background**

### **A. Description of the Parties**

3. Arroyo Energy is a Delaware limited partnership that is authorized to sell energy, capacity and ancillary services at market-based rates. Arroyo Energy does not own or control any assets used in the generation, transmission or distribution of electricity, nor does it own or control any inputs to electric generation, and it is not currently engaged in any business activities.

4. Arroyo Power GP Holdings LLC (Arroyo Power GP) is a wholly-owned subsidiary of Arroyo Energy Investors LP (Arroyo Investors LP), which holds a 1 percent general partnership interest in Arroyo Energy, and Arroyo Investors LP, which holds a 99 percent limited partnership interest in Arroyo Energy. Arroyo Power GP and Arroyo Investors LP are indirect wholly-owned subsidiaries of Bear Stearns Companies, Inc. (Bear Stearns). Arroyo Energy Holdings, LLC, a wholly-owned subsidiary of Texas Investment Holdings, Inc. (Texas Investment), holds a 99 percent limited partnership interest in Arroyo Investors LP, and Texas Investment holds a 1 percent general partnership interest in Arroyo Investors LP. Texas Investment is a direct wholly-owned subsidiary of Bear Stearns, a global investment banking, securities trading and brokerage firm.

5. Calpine Energy is a limited partnership and an indirect wholly-owned subsidiary of Calpine Corporation (Calpine). It is authorized to sell energy, capacity and ancillary services at market-based rates. Calpine Energy provides reactive support and voltage control services. Calpine Energy does not own any electric power generation or transmission facilities and does not have a franchised electric power service area. It does not own or control any inputs to electric generation.

6. Calpine is engaged through subsidiaries in the development, financing, acquisition, ownership and operation of independent power production facilities and the wholesale marketing and sales of electricity in the United States and abroad.

7. CalBear Energy is an indirect wholly-owned subsidiary of Bear Stearns. CalBear Energy is the successor of Arroyo Energy.

8. Calpine Merchant is a direct wholly-owned subsidiary of Calpine Energy Services Holdings, Inc., which in turn is a direct wholly-owned subsidiary of Calpine. Calpine Merchant is authorized to sell energy, capacity and ancillary services at market-based rates. It does not own or control any assets used in the generation, transmission or distribution of electricity, nor does it own or control any inputs to electric generation. Calpine Merchant is not currently engaged in any business activities.

## **B. The Proposed Transaction**

9. Applicants state that the proposed transaction is a Bear Stearns internal corporate restructuring that will result in two newly-formed direct wholly-owned subsidiaries of Texas Investment: (1) Texas Power GP LLC, holding a 1 percent general partnership interest in Arroyo Energy; and (2) Texas Power Holdings LLC, holding a 99 percent limited partnership interest in Arroyo Energy. Once this internal corporate restructuring has occurred, Arroyo Energy will be renamed as CalBear Energy.

10. Applicants anticipate that after the internal corporate restructuring has taken place, Bear Stearns, CalBear Energy, Calpine, Calpine Merchant and Calpine Energy will enter into a series of contractual arrangements to facilitate Calpine Energy's and CalBear Energy's trading in physical and financial gas and electric power with third-parties and with each other, and engaging under certain circumstance in certain energy management services, such as scheduling power and gas transportation and transmission services.

11. Applicants state that there would be no change in direct or indirect ownership of either CalBear Energy or Calpine Energy in connection with the contractual arrangements. They state that neither Calpine Merchant nor any other affiliate of Calpine would acquire any interest in CalBear Energy as a result of the contractual arrangements, and CalBear Energy would remain an indirect wholly-owned subsidiary of Bear Stearns.

## **III. Notice of Filing and Responsive Pleadings**

12. Notice of this filing was published in the *Federal Register*, 70 Fed. Reg. 56,650 (2005), with comments, protests or interventions due on or before October 1, 2005. Entergy Services, Inc. (Entergy) on behalf of Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Entergy Mississippi, Inc., and Entergy New Orleans, Inc. (collectively, the Operating Companies) filed an untimely motion to intervene and comment on October 4, 2005. On October 19, 2005, Applicants filed an answer to Entergy's motion to intervene.

## **IV. Discussion**

### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motion to intervene serve to make the entity that filed it a party to this proceeding. The Commission will grant the motion to intervene out of time filed by Entergy given its interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer filed in this proceeding because it has provided information that assisted us in our decision-making process.

**B. Consistency with the Public Interest**

15. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition "will be consistent with the public interest." The Commission's analysis of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation. As discussed below, we find that the proposed transaction is consistent with the public interest because it will not adversely affect competition, rates, or regulation.

**1. Effect on Competition**

16. Applicants state that the proposed transaction will not adversely affect competition and raises no horizontal market power concerns. Applicants submit that the internal corporate restructuring will not result in any increase in market concentration. They state that even assuming that the Agreements would result in the transfer of control of jurisdictional facilities to Calpine Merchant from CalBear Energy and Calpine Energy, the transaction would have a *de minimis* effect.

17. Applicants state that affiliates of Bear Stearns own or control limited interests in generating capacity in the same geographic markets in which affiliates of Calpine also own or control electric generating capacity. They state that once the transaction has occurred, the amount of combined generating capacity in each of these markets held by affiliates of both Bear Stearns and Calpine will be small compared to total installed generating capacity in those markets. Applicants assert that the Bear Stearns affiliates or the Calpine affiliates have a *de minimis* market share in each of these markets now and that the increase in market share that occurs by combining the Bear Stearns-affiliated interest with the Calpine-affiliated interest is *de minimis*.

18. Applicants state that the affiliates of Calpine and Bear Stearns together have interests in the following relevant markets: approximately 1,374 megawatts (MW) in PJM Regional Transmission Operator (PJM), which is less than 1 percent of the capacity in the PJM market; approximately 419 MW in the New York Independent System Operator (NYISO), which is about 1.1 percent of the installed capacity in the NYISO market; approximately 1,390 MW in the New England Power Pool (NEPOOL), which is about 4.5 percent of installed capacity in NEPOOL; approximately 1,074 MW in the Public Service Company of Colorado (PSCO) control area, which represents about 12 percent of the installed capacity in the PSCO market; and approximately 1,456 MW of

generating capacity in the Midwest Independent Transmission System Operator, Inc. (MISO), which is about 1.1 percent of the installed capacity in that market. Applicants assert that Calpine and Bear Stearns business transactions in PJM, NYISO, NEPOOL, PSCO, MISO are *de minimis*.

19. Applicants state that the output of approximately 40 percent of the Calpine-affiliated generation is committed to a third party under a long-term contract in the PJM market. They state that the output of most of the Calpine-affiliated generation is committed under long-term contracts to third parties in the NYISO. Applicants explain that the 119 MW of generation affiliated with Bear Stearns represents less than 0.4 percent of installed capacity in NEPOOL and that the increase in market share that occurs by combining the Bear Stearns-affiliated interests with the Calpine-affiliated interests is *de minimis*. Applicants indicate that all of the output of both Calpine-affiliated generation and Bear Stearns-affiliated generation in the PSCO control area is committed under long-term contracts to third parties. The 173 MW of generation affiliated with Bear Stearns is less than 2 percent of installed capacity in the PSCO control area, and the increase in market share that occurs by combining the Bear Stearns-affiliated interest with Calpine-affiliated interests is *de minimis*. Applicants state that the output of substantially all of the Calpine's affiliated generation in MISO is committed under long-term contracts to third parties.

20. Entergy comments that the application fails to provide sufficient information to accept or dispute that there will be no increase in concentration in the relevant geographic market. Therefore, Entergy states that it reserves the right to challenge the transactions on the basis of horizontal market power as more information becomes known regarding the nature of the arrangements among the Applicants.

21. Applicants respond in their answer that the only possible effects on competition resulting from the transaction, if any, are not only *de minimis*, but are outside Entergy's control area. They further state that under a worst-case scenario that assumes that all of Bear Stearns' and all of Calpine's generation come under the common control of Calpine Energy, any resulting increase in market power would be *de minimis*.

22. We find that the Applicants have demonstrated that the market share is *de minimis* in the relevant geographic markets, and therefore, that the combination of their generation assets will not harm competition in any relevant market. In the one market where Applicants control enough generation assets that the combination of those assets could materially increase market concentration, PSCO, Applicants have committed all of their generation to third parties through long-term contracts.

## **2. Effect on Rates**

23. Applicants contend that the proposed transaction will not have an adverse effect on rates. They assert that all sales of electric energy, capacity, and ancillary services will continue to be made by Arroyo Energy and Calpine Energy at market-based rates. Applicants state that any sales of electric energy or capacity by Calpine Merchant will be made at market-based rates. They also state that none of the Applicants have any captive customers whose rates could be affected by the proposed transaction and they have no franchised electric service areas. Applicants note that they do not provide unbundled transmission service.

24. Entergy comments that it is a wholesale power customer of Calpine Energy and that the Application provides no substantive information regarding how the proposed transactions may affect current or future purchases by wholesale customers or the management of current contracts.

25. In their answer, Applicants state that the transaction will not affect any of Entergy's arrangements or contracts with Calpine Energy. They state that Entergy purchases all wholesale power from Calpine Energy and its affiliates at market-based rates. Applicants contend that the transaction does not result in a transfer of any contract from Calpine Energy to Calpine Merchant, nor does it in any way alter the economic rights that Entergy may have under any existing contract or affect Calpine Energy's ability to perform under its contractual obligations.

26. We find that Applicants have shown that they have no captive customers whose rates could be affected and that all sales will continue to be made at market-based rates. We note that nothing in the application indicates that rates to customers will increase as a result of the proposed transaction. For these reasons, we are satisfied that the proposed transaction will not adversely affect rates.

## **3. Effect on Regulation**

27. Applicants assert that the proposed transaction will not have an adverse effect on regulation. They note that the proposed transaction will not diminish the Commission's regulatory authority because it will not result in the formation of a registered holding company under the Public Utility Holding Company Act of 1935. In addition, Applicants state that the proposed transaction will have no effect on state commission regulation because all sales from CalBear Energy and Calpine Energy are not presently under state jurisdiction and following the consummation of the proposed transaction, the sales will be at wholesale and thus will not be subject to state regulation.

28. We note that no party has raised concerns about the proposed transaction's effect on state or federal regulation. Also, no state has indicated that it lacks jurisdiction to consider the transaction's effect on retail rates. We conclude that the proposed transaction will not adversely affect state or federal regulation.

The Commission orders:

(A) Applicants' proposed transaction is hereby authorized upon the terms and conditions and for the purposes set forth in the application, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever new pending or which may come before this Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

(F) If the transaction results in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. §292.207 shall be made.

(G) Applicants shall notify the Commission within 10 days of the date of the disposition and acquisition of jurisdictional facilities has been consummated.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.